IN THE

Supreme Court of the United States

OCTOBER TERM 1945

No.

JENNIE HERZIG, as Administratrix of the goods, chattels and credits of Herman Weintraub, deceased,

Respondent,

against

SWIFT & Co.,

Petitioner.

BRIEF IN SUPPORT OF PETITION

Opinions Below

There are four opinions. On first trial, District Court dismissed complaint (R. 1st trial, pp. 55-58). Reversed on appeal by Circuit Court (146 F. [2d] 444; R. 1st trial, pp. 66-71). District Court denied motion to set aside verdict (R. pp. 279-281). Affirmed on appeal by Circuit Court (R. pp. 287-290).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered March 15, 1946. Jurisdiction to entertain this petition is provided by U. S. Code Title 28, Section 347.

Statement of the Case

Respondent, as administratrix of the estate of Herman Weintraub, brought this action to recover damages under Florida law for his death on January 23, 1941, in an automobile accident in Florida alleged to have been caused through the negligence of petitioner.

Deceased had no dependents (R. pp. 5, 8, 9) and the action was brought by his administratrix. Respondent pleaded the Florida statutes (R. p. 5). They provide as follows:

> Section 4960 (now 7047): "Whenever the death of any person of this State shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness or default of any corporation, or by the wrongful act, negligence, carelessness or default, of any agent of any corporation in his capacity of agent of such corporation * * * and the act, negligence, carelessness or default is as would, if the death had not ensued, have entitled the party injured to maintain an action * * * and to recover damages in respect thereof, then and in every such case the person or persons who, or the corporation * * *, which would have been liable in damages, if death had not ensued, shall be liable to an action in damages * * * notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony."
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> Section 4961 (now 7048): "Every such action shall be brought by and in the name of the widow or husband, as the case may be, and where there was neither widow or husband surviving the deceased, then the minor child or children may maintain an action; and where there was neither widow nor husband nor minor child nor children then the action may be maintained by any person or persons dependent upon such person killed for a support, and where there is neither of the above classes of the persons to sue then the action may be maintained by the executor or administrator as the case may be, of the person killed."

Respondent also pleaded that pursuant thereto the administratrix may recover the value at decedent's death of the prospective earnings and savings that from the evidence could reasonably have been expected but for his death (R. pp. 5, 6).

It was stipulated that the testimony of respondent's witness Walter O'Rourke would be the same as on the record of the first trial and deemed in evidence (R. p. 66). He testified that in this class of cases the rule of damages was the value at the time of decedent's death of the prospective earnings and savings that from the evidence could reasonably have been expected but for his death (R. 1st trial, pp. 31, 34); that where a man had high earnings but no savings there would be no prospective estate (R. 1st trial, pp. 41, 42); that the burden of proving such expectation of savings and prospective earnings is affirmatively on plaintiff (respondent here) (R. 1st trial, p. 34); and that where there is no reasonable future expectation of an estate the recovery may be nominal (R. 1st trial, pp. 33, 39, 40). Deceased at time of his death was forty-three years old (R. p. 11) and had been working for about twenty-five years as a partner in a rigging company (R. pp. 11, 25, 27). His earnings for 1940, which respondent contended was an average year, were $2,852.64 (R. pp. 50-52, 55). His savings were about $2,000 (R. pp. 15, 16). He had a life expectancy of 25.99 years (R. p. 67). He had no car of his own and was using a borrowed car (R. p. 22).

There was a verdict by the jury after trial in the District Court for $20,000, which the District Court refused to set aside (R. pp. 279-281) and entered judgment for $20,171.50 (R. p. 282). Petitioner appealed to the Circuit Court of Appeals for the Second Circuit, which affirmed said judgment and entered its judgment March 15, 1946 (R. p. 291).

The Circuit Court of Appeals held that the amount of the damages was a question of fact which it had no power to review.

Petitioner now prays for the issuance of a writ of certiorari directed to said Circuit Court of Appeals to review the case and examine the judgment which is contrary to the Florida law.

Assignments of Error

The Circuit Court of Appeals erred in the following respects:

1. In not examining as to amount the judgment of the United States District Court on the ground that it had no power to do so.

2. In affirming without reviewing a District Court judgment on an important question of local law (that of the State of Florida) in a way contrary to and in conflict with the applicable local decisions of the highest court of the State of Florida in a manner which the highest court of the State of Florida has strongly and repeatedly refused to permit.

3. In sanctioning by its decision a departure from the usual course of judicial proceedings by the District Court.

4. In deciding that the error in the charge as to contributory negligence was corrected.

5. In deciding that there was no error in the charge as to proximate cause or that such error was corrected.

POINT I

The Circuit Court of Appeals should have reviewed the amount of the District Court judgment which clearly exceeds the limitation provided by the Florida law. The right and power of the Circuit Court of Appeals to make such review where a limitation provided by law has been exceeded is of great importance and frequently exercised. The omission to do so here should be reviewed by this Court.

The general rule is that the Circuit Court of Appeals may not examine the amount of the verdict either as to inadequacy or excessiveness. It may, however, examine such amount where it is either below or above what the plaintiff clearly may recover as a matter of law. There are numerous cases where the circuit courts have done this. The Circuit Court of Appeals has also often considered in what event they had the right to review the amount.

In *Reisberg* v. *Walters,* 111 F. (2d) 595, 597, 598, the Circuit Court of Appeals for the Second Circuit reviewed all the law on the subject and concluded that it had the right to review the judgment as to amount where the jury gave less than the undisputed amount or in excess of a definite limitation provided by law.

In *Herring* v. *Luckenbach SS. Co., Inc.,* 137 F. (2d) 598 (C. C. A. 2), the Court said:

> "* * * appellate courts act in general only where an improper excess is clearly ascertainable from the record."

The right to consider such amount was also similarly reviewed in *Paine* v. *St. Paul Union Stockyards Co.,* 35 F. (2d) 624, and in *Wayne* v. *N. Y. Life Insurance Co.,* 132 F. (2d) 28, 37. The decision of this Court in *Fairmont*

Glass Works v. *Cub Fork Coal Co.*, 287 U. S. 474, 484, 485, supports this and contains nothing to the contrary.

Furthermore, it was error for the District Court to enter judgment upon this verdict and it was within the power and duty of the Circuit Court of Appeals to review this error. As was said in *Glenwood Irr. Co.* v. *Vallery*, 284 Fed. 483, at p. 484:

> "The verdict is perverse and directly violative of the charge of the Court. When that appears as a matter of mathematical calculation, the verdict cannot stand. It is error of law to enter judgment upon it, which an Appellate Court may properly review * * *. Nor does such a decision violate the rule that a refusal of the trial Court to disturb the verdict on motion for a new trial is matter of discretion, because the duty not to enter judgment upon such a verdict is one of law, and not of discretion. Or, if there was discretion, it was so abused as to support correction on writ of error."

To same effect are *Pugh* v. *Bluff City Excursion Co.*, 177 Fed. 399, 410 (C. C. A. 6); *Paine* v. *St. Paul Union Stockyards Co.*, 35 F. (2d) 624, 627.

The Circuit Court of Appeals clearly had the power to review the judgment of the District Court which was not based upon a future estate as evidenced by earnings and savings and was contrary to the law of Florida. It should have reversed said judgment. In this case there was a distinct, definite limitation on the recovery. Respondent pleaded that limitation: that the administrator may recover the value at decedent's death of the prospective earnings and savings that from the evidence could reasonably have been expected but for his death (R. pp. 5, 6). The District Court so charged (R. pp. 250, 251), saying: "Your function is to judge how much would that man have accumulated and saved or put by in the years during which he would have lived had he not been killed, and you must discount that at the present value" (R. p. 251).

The matter of whether the Circuit Court of Appeals can and should reverse a judgment of a District Court where the amount awarded clearly exceeds a limitation provided by law is of great importance and of frequent application in the Federal courts. There is not a re-examination of the facts passed on by the jury, because in this case the jury has no right to exceed or disregard such limitation as a matter of law.

POINT II

The verdict and judgments of the District Court and the Circuit Court of Appeals are contrary to the law of Florida.

The Florida law provides for a right of action by a husband or widow or minor children or by dependents, or, if there is none of these classes, then by an administrator (R. p. 5). The Florida courts do not impose any limitation on a recovery in the first three classes. For example, in *Foster* v. *Thornton,* 125 Fla. 699 (170 So. 459, also reported 152 So. 677 and 160 So. 580), a judgment for $15,000 for loss of plaintiff's wife was upheld. It is only where there is no dependency and the action is brought by the administrator that there is this limitation.

Respondent pleaded the limitation of recovery under the Florida law and the District Court charged it. The Florida cases are:

Jacksonville v. *Bowden,* 54 Fla. 461 (45 So. 755);
Florida East Coast RR. Co. v. *Hayes,* 67 Fla. 101 (64 So. 504);
Marianna v. *Blountstown,* 83 Fla. 542 (91 So. 553);
Union Bus Co. v. *Smith,* 104 Fla. 569 (140 So. 631);
Atlantic Coast v. *Woods,* 110 Fla. 147 (148 S. 542);
International Shoe v. *Hewitt,* 123 Fla. 587 (167 So. 7).

Both the District Court and the Circuit Court of Appeals appear to stress the earning capacity of deceased and overlook the necessity of respondent proving what deceased would save out of such earnings. Although he earned $2,852.64 for 1940, which respondent contended was an average year (R. pp. 50-52, 55), he was not a saving man, and there was no incentive or inducement for him to save. At the time of the accident he was on a winter vacation, using a borrowed car. If there are no savings there would be no future estate no matter how much the earnings (R. 1st trial, pp. 41, 42). As the Court said in *International Shoe* v. *Hewitt*, 123 Fla. 587 (supra):

> "It is a matter of common knowledge that the average person saves very little above living expenses and leaves very little of anything in the way of an estate."

In this case the future estate could be readily computed. In twenty-five years at the same work he had saved $2,000. (This is not included in the future estate as the administratrix already has it.) He had a life expectancy of 25.99 years, so that under the evidence his future estate would likely be $2,000. This discounts at simple interest of 6% (the New York State legal rate) to a present value of $781.25. It clearly appears that the jury in awarding $20,000 disregarded the limitations contained in the Florida law and in the charge of the District Judge. This sum represents a future estate of $51,200 computed at the same New York State legal rate.

In *Florida East Coast RR. Co.* v. *Hayes*, 67 Fla. 101 (64 So. 504) (supra), where there was a life expectancy of forty years, the Court computed that where such future estate was $1,000, its present value was $46.02; and that a present judgment of $15,000 represents an estimated future estate of over $300,000. At page 105 the Court said:

> "* * * the proper measure of such damages is the present worth of decedent's life to an estimated prospective estate that he probably would have earned and saved after becoming of age and during his life expectancy to be left at his death."

The highest court in Florida has never allowed such a judgment to stand, because contrary to the law of that State, although it has allowed remittiturs to be filed for reduced amounts in order to terminate litigation. But in no such case has it allowed such amount in over $2,000 except in one case, where it allowed $2,500.

The present judgment is in conflict with the decisions of the highest court of Florida. Furthermore, that law is the law of this case, as pleaded, evidenced, tried and charged.

If this judgment is allowed to stand it will always be a source of embarrassment to the highest court of Florida.

POINT III

There was a departure from the usual course of judicial proceedings by the District Court.

During the trial the District Court stated as a matter of law how the accident had, in part, occurred. This was not a ruling on something during the trial, nor a casual statement. It was a ruling of law. The matter was important and on a vital point in the case.

This case involved a collision in daylight on a long, straight road between Weintraub's northbound Buick and petitioner's southbound truck. The petitioner's testimony was that the truck was on its own side of the road following the car of a Mrs. Youngs when it was struck by the Buick which was operated fast and out of control. Mrs. Youngs, who was respondent's only witness to the occurrence, stated that the truck was passing her car and was partly on the left side of the road at the time of the contact. At the time of the contact and immediately afterwards she had been subjected to a number of severe shocks.

The question was whether she saw the truck alongside her car or heard the collision to her rear and looked back.

She distinctly remembered seeing the truck fall on its side away from her and saw its wheels. If the truck was alongside of her, then this was the left side. If the truck fell on its right side as petitioner's witnesses stated and the photographs showed, then she had heard the noise behind her and had looked back and seen it. It was error, therefore, for the District Judge to rule:

> "The Court: I will take judicial notice that the side away from her was the left side, and that is the side on which the truck fell" (R. p. 91).

This ruling by its nature decided also as to how the accident occurred and was a contradiction of petitioner's evidence. As it was a ruling of law, the jury was bound to obey it. The Circuit Court of Appeals was in error in not reversing the judgment of the District Court upon this ground.

POINT IV

The Circuit Court of Appeals erred in its decision as to the charge of the District Court.

There were two distinct errors of law in the charge. The main charge as to contributory negligence was not complete in that the Court had not charged that there could be no recovery if deceased was negligent in the slightest degree and such negligence contributed to the accident. This law applies in Florida, New York, and the Federal courts (*Co-operatives* v. *Shields,* 71 Fla. 110 [70 So. 924]; *Rydell* v. *Greenhut,* 140 App. Div. [N. Y.] 926; *New York* v. *Thierer,* 221 Fed. 571, 574). Petitioner requested the Court to charge accordingly (R. p. 255). The Court thereafter gave a further charge which again omitted this (R. p. 258). The Circuit Court of Appeals is in error in holding that this error was cured (R. p. 290).

It was error for the District Judge to charge that proximate cause was not so important in this case (R. p. 252), to which petitioner excepted (R. pp. 253, 254). In view of the undenied extreme and unchecked speed of Weintraub's car, proximate cause was definitely important. This was not corrected in the further charge (R. pp. 257, 258). It was error for the Circuit Court of Appeals to hold in effect that there was no error in this or that it had been cured (R. p. 290).

Wherefore, petitioner prays that a writ of certiorari issue of this Honorable Court to the United States Circuit Court of Appeals for the Second Circuit to review said cause.

Respectfully submitted,

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